

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

DA 95-1364

In the Matter of)
)
American Cablesystems of)
Florida Ltd., d/b/a Continental)
Cablevision of Broward County,)
and)
)
Continental Cablevision of)
Jacksonville, Inc.)
)
Complainants,)
)
v.)
Florida Power & Light Company)
)
Respondent)

CC Docket No. 95-95

PA 91-0012

DOCKET FILE COPY ORIGINAL

To: Chief, Common Carrier Bureau

PETITION FOR CLARIFICATION AND RECONSIDERATION

Respondent Florida Power & Light Company ("FPL"), pursuant to Commission Rule 47 CFR § 1.106, moves for clarification and reconsideration of the Hearing Designation Order adopted in the above matter on June 15, 1995 and released June 15, 1995 and in support therefor states:

I. No Substantive Issue Remains to be Heard

1. The Chief of the Common Carrier Bureau found in paragraph 10 of the Hearing Designation Order that FPL could not use subaccount 369.1 in calculating pole attachments rates and in paragraph 14 of the Hearing Designation Order, ordered that the complaint of Petitioner is granted to the extent indicated in Paragraph 10 of the Order, and to the extent not granted, is referred to an Administrative Law Judge. FPL seeks clarification of the issue(s) referred to the Administrative Law Judge.

2. Use of the 369.1 subaccount in calculating the pole attachment rate was the sole issue between the parties.

a. In paragraph 18 (pages 6-7) of its Petition, Petitioner states "[FPL] has included only a portion of the full Account 369 in the denominator of the maintenance account. It is this error that creates a pole attachment rate that exceeds the maximum annual just and reasonable rate by \$.35 per pole." (Emphasis added.)

b. In its Response, FPL agreed with Petitioner that the sole issue, (the alleged "error") was FPL's use of the subaccount 369.1. (Response, pgs. ii, 1-18).

c. In its Reply, Petitioner raises no other substantive issue. (Reply, pgs. 1-8)

d. In paragraphs 8 and 9 of the Hearing Designation Order, the Chief of the Common Carrier Bureau identifies the substantive issue as FPL's use of the Account 369 to exclude underground plant expenses from the maintenance expense

denominator. (Pgs. 4 and 5)

3. FPL respectfully requests clarification as to Ordering Clauses 14 and 15.1: (a) What substantive issue of Petitioner's has not been granted and, therefore, is referred to the Administrative Law Judge and (b) If no substantive issue remains after the Chief's determination in paragraph 10 of the Hearing Designation Order, is the Administrative Law Judge, in determining whether FPL charged rates that exceed the maximum amounts allowable, to review evidence and law with respect to use of the 369 subaccount and make a de novo determination of the issue as to reasonableness of FPL's use of the subaccount is setting a reasonable rate or is the Administrative Law Judge to determine refund amount only.

II. There is No Evidence or Basis for Rejecting FPL's Use of Subaccount 369.1; The Evidence is to the Contrary

4. The Bureau Chief, in paragraph 10 of the Hearing Designation Order, found three reasons for rejecting use of the subaccount 369.1: (i) FERC only approves, but does not require a utility to report the subaccount on its FERC Form 1; (ii) use of the point account results in a higher attachment rate [and by implication, therefore, must be "unfair" to the cable company], and (iii) "fairness" to the cable company would require the Commission to disaggregate other [unspecified] accounts to eliminate other [unspecified] mismatches between investments and expenses and that this action by the Commission would unduly complicate the pole

attachment rate calculation process.

5. The record evidence is that none of the concerns raised in paragraph 10 of the Hearing Designation Order rejecting FPL's use of the subaccount 369.1 are present in this instant case. FPL, therefore, seeks reconsideration of FPL's use of subaccount 369.1 based on the evidence and based on the stated Commission rationale of affording accurate pole attachment rates based on pole attachment data, fair to both parties, and using data which is publicly available. (Designation Order ¶ 2.)

Balance of the FCC formula is not upset by using 369.1

6. Use of subaccount 369.1 results in a more accurate rate and does not upset the balance of the overall pole attachment formula. There is no basis for the finding in paragraph 10 of the Hearing Designation Order that if subaccount 369.1 were used, "we would in fairness to Continental, require Florida Power to disaggregate other accounts to eliminate other mismatches between investments and expenses." Indeed, no such accounts are identified and no basis for this statement is provided. FPL, respectfully, believes that this is an unwarranted assumption which flies in the face of the record evidence and should be reconsidered.

7. In Affidavit of Rosemary Morley attached to FPL's Response as Exhibit A and in its Response, FPL explained why FPL's use of the subaccount makes for a more accurate pole attachment rate and does not upset either the maintenance component or the

balance of the pole attachment rate as a whole:¹ (a) use of the subaccount keeps in balance the nominator and denominator within 369 and is more accurate as both are now based on poles and overhead service (Exhibit C, Response, ¶'s 7-9); (b) the pole attachment rate as a whole is kept in balance, in that, administrative and general expenses are kept in balance because both the numerator and denominator are based on total utility figures (Exhibit C, Response, ¶ 10); (c) the tax component is kept in balance because both numerator and denominator reflect total utility figures (Exhibit C, Response, ¶ 11); and (d) the only remaining component of the carrying charge are the depreciation component and the overall rate of return. These are also kept in balance (Exhibit C, Response, ¶ 12).

8. These facts are ignored in the Hearing Designation Order. Instead, the Chief simply states without identification of account, without identification of effect, without basis, without discussion, and without record evidence, that "fairness to the

¹"Use of the subaccount 369.1 creates a more balanced and accurate maintenance component." (¶'s 9 and 10, Affidavit of Rosemary Morley, Response of FPL) Use of the subaccount 369.1 does not upset the balance of the pole attachment rate as a whole because both the numerator and denominators are consistent for the administrative and general expenses and for the tax component. The only remaining components are the depreciation component and the overall rate of return. The depreciation component is "in balance" because it is based on a specific depreciation rate for the distribution poles multiplied by the ratio of gross to net distribution pole plant. The overall rate of return, by design, applies to total rate base, including distribution poles. (¶ 10, Affidavit of Rosemary Morley, Response of FPL.) The Chief, in the Hearing Designation Order, fails to explain why he found other mismatches occur or how use of the subaccount 369.1 would result in unfair "imbalance" -- an assumption which FPL believes is erroneous and not based on any record evidence.

Petitioner" would require the Commission to disaggregate other components of the rate formula. (Hearing Designation Order ¶ 10.)

9. The Hearing Designation Order is contrary to the finding of the Commission that, in fact, use of subaccount 369.1 results in greater accuracy of the pole attachment formula when, as in this case, expenses chargeable to cable operators are not added in. (Response, pgs. 14, 15.)

10. The Hearing Designation Order is contrary to the Commission's finding that refinements are possible when refinement results in greater accuracy. (Response, pg. 14.)

11. The statement in the Hearing Designation Order that unilateral disaggregation of utility regulatory accounts by the Commission is necessary if use of subaccount 369.1 is allowed [for the purpose of reducing pole attachments rates] is totally unfounded. Not only is this not necessary as no mismatches would occur--see paragraphs 7-8 above-- but such action by the FCC would be without regard to fact, without regard to the state Public Service Commission Order approving the utility depreciation rates and the utility's method of accounting,² without regard as to public availability of the subaccounts (whether these subaccounts are published as part of the FERC Form 1 or elsewhere), and without regard to FPSC, FERC and utility rate making processes. That this action by the Commission would unduly complicate the pole attachment rate calculation process--as stated in the Hearing

²FPL's change in depreciation rates, including adoption of the subaccount 369.1, was approved in FPSC Order No. 17903. See FPL's Response, Exhibit D, ¶'s 8-10.

Designation Order--is clear. That it is not within the jurisdiction of the Commission to dictate what accounts or subaccount the utility should use for the electric utility rate making methodology or what accounts or subaccounts the electric utility should report in its FERC Form 1 is also clear. FPL submits that it is also clear from the record evidence that there is no basis or justification for the statement in paragraph 10 of the Hearing Designation Order that mismatches exist among the other accounts used in pole attachment that would have to be disaggregated out of "fairness" to the cable company.

Use of subaccount 369.1 is an integral part of FPL's Utility Accounting Methodology, approved by the FPSC.

12. FPL's use of subaccount 369.1 is an integral part of its calculation of utility rates and account methodology and was approved by the Florida Public Service Commission as part of FPL's development of depreciation rates. (Exhibit D, Response, ¶s 8-9; Exhibit E.) FPL's use of subaccount 369.1 was not pulled out of the air in order to use the subaccount in pole attachment rates. It was not, as suggested in the Hearing Designation Order, developed for the sole purpose of raising cable attachment rates by \$.35. (See Affidavit of Albert P. Farinelli, Jr. attached to FPL's Response as Exhibit D and certified order of FPSC attached to FPL's Response as Exhibit E.)

FERC Requested that FPL Report Its Depreciation Accounts Including Subaccount 369.1

13. FPL needed to provide FERC with the account information that would allow FERC to calculate the depreciation rates by FERC account or subaccounts and, for that reason, and at the request of FERC, FPL began reporting subaccount 369.1 on its FERC Form 1. (Exhibit D, Response, ¶ 10.)

**It is Just as Expeditious and Simple to Read Subaccount 369.1
from a FERC Form 1 as to Read Account 369**

14. FPL's figures are publicly available and reported in FPL's FERC Form 1. (Response, Exhibits D and B.)

15. The pole attachment rate calculations are based on regulatory accounts from publicly available records, such as the Federal Energy Regulatory Commission's (FERC's) Uniform system of Accounts. Whether that figure is on the form through requirement, request, or approval is irrelevant. Utilities do not make up what subaccounts to use, nor what subaccount to report. The statement in the Hearing Designation Order, ¶ 10, that FERC did not "require" FPL to use this account is inaccurate (see paragraph 10 above). Not only is this finding inaccurate, but the statement that somehow FPL's reporting of the subaccount makes for a less expeditious calculation of pole attachments rates is specious at best. Looking at account 369.1 on FPL's FERC Form 1 is not more complicated or time-consuming than looking at account 369 on FPL's FERC Form 1. Both are equally available; both require exactly the same amount of effort to calculate the pole attachment rate. (See In The Matter of Booth American Company v. Duke Power (PA-82-0068), Released March

11, 1984) (use of publicly available data required).

16. A utility is to be assured the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole" (47 U.S.C. §224.)

17. To deny FPL use of subaccount 369.1 is to deny FPL its rightful recovery.

WHEREFORE, FPL respectfully requests:

(A) that the Bureau reconsider the evidence as set out in FPL's Response and affidavits and exhibits attached thereto and approve FPL's use of the subaccount.

(B) Alternatively, that FPL the Bureau specifically identify accounts and disaggregations that are said to be necessary to be "fair" to the cable company should point account 369.1 be used by FPL (i.e., what disaggregations would eliminate alleged mismatches between investment and expenses) and to explain why publication in FERC Form I, at the request of the FERC is insufficient to meet the Commission's requirement that the data used in the calculating the pole attachment rate be available from publicly available records and

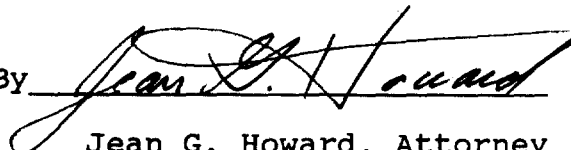
(C) Alternatively, that the entire matter be referred to the Administrative Law Judge for determination de novo as to the

correctness of FPL's use of subaccount 369.1.

Respectfully submitted,

FLORIDA POWER & LIGHT COMPANY

By



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July 5, 1995

Certificate of Service

I hereby certify that the foregoing "Petition for Clarification and Reconsideration" was mailed this 5 day of July, 1995 by overnight mail to William F. Caton, Acting Secretary, Federal Communications Commission, 1919 M Street, NW - Room 222, Washington, D.C. 20554 and a copy to:

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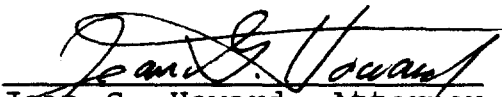
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